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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Tehama)

THE PEOPLE,

Plaintiff and Respondent,

v.

JEARL WESLEY SISTRUNK,

Defendant and Appellant.

C039853

(Super. Ct. No.
NCR55335)

Pursuant to a bargain, defendant Jearl Wesley Sistrunk pled guilty to willful failure to register as a sex offender (Pen. Code, § 290, subds. (a)(1)(A), (g)(2)) and admitted three prior strike convictions (Pen. Code, §§ 667, subds. (b)-(i), 1170.12). At sentencing, following the court's denial of defendant's request to strike his prior convictions, he was sentenced to state prison for a term of 25 years to life.

On appeal, defendant contends (1) the trial court abused its discretion in failing to strike two of the prior convictions, (2) a term of 25 years to life is cruel and

unusual, (3) his counsel's failure to raise the cruel and unusual punishment argument was ineffective assistance of counsel, and (4) the "Three Strikes" law is unconstitutionally vague. We reject each claim.

DISCUSSION

I

Defendant contends that the trial court abused its discretion in failing to strike two of his three strikes. We disagree.¹

"The California Supreme Court has ruled that for a trial court to depart from the sentencing scheme of the 'Three Strikes' law, 'the defendant [must] be deemed [to be] outside the scheme's spirit, in whole or in part,' in light of 'the particulars of his background, character, and prospects' and the nature and circumstances of his present felonies and strikes." (*People v. Strong* (2001) 87 Cal.App.4th 328, 331, quotations from *People v. Williams* (1998) 17 Cal.4th 148, 161, fn. omitted.)

Defendant, who was 67 years old at the time of sentencing, argues the court abused its discretion in denying his request to

¹ Relying on *People v. Benevides* (1998) 64 Cal.App.4th 728, which held that where a trial court does not exercise its discretion to dismiss or strike a prior serious felony conviction under Penal Code section 1385, appellate review is unavailable to the defendant (*id.* at pp. 734-735), the People argue that the "motion to strike" is not reviewable. *Benevides* is not on point since the trial court herein exercised its discretion on defendant's request.

strike his priors for the following reasons: "[He] was sentenced to 25 years to life based on prior convictions all arising from the same course of conduct almost two decades ago and a current case that was victimless and non-violent -- a failure to register. There was nothing serious or violent about [his] violation of [Penal Code] section 290 and the punishment was disproportionate to the crime committed. Unlike other Three Strikes crimes, [his] failure to register is itself a crime only because of his past sex crimes; it is not a worse crime because of those past crimes." (Emphasis omitted.)

The probation officer's report, which was read and considered by the trial court, showed the following record of convictions for defendant: In 1977 and 1978, driving under the influence (Veh. Code, § 23152, subd. (a)), for which he received separate grants of probation and a fine; in 1978, an unspecified misdemeanor, for which he received a fine and two days in jail; in 1980, battery (Pen. Code, § 242), for which he received 30 days in jail; in 1983, three counts of forcible lewd and lascivious acts with a child under 14 years of age (Pen. Code, § 288, subd. (b)), for which he was sentenced to eight years in state prison; he was paroled in 1987; in 1989, driving under the influence (Veh. Code, § 23152, subd. (a)), for which he was placed on probation for three years; later in 1989, he was found in violation of parole and returned to prison; in 1990, driving under the influence with injury (Veh. Code, § 23153, subd. (a)), for which he was placed on five years probation with 150 days in jail; in 1992, another driving under the influence (Veh. Code,

§ 23152, subd. (a)), for which he was placed on five years probation; in 1993, another driving under the influence violation (Veh. Code, § 23152, subd. (a)), and another grant of five years probation with 210 days of jail; and, in 1996, a misdemeanor failure to register as a sex offender (Pen. Code, § 290).

Defendant attempts to trivialize his present offense, his second for failing to register. He ignores the rest of his story, however, the Three Strikes law does not.

"The focus of the three strikes law is on the defendant's conduct, i.e., whether the defendant has not in the past obeyed the law. The three strikes law is not grounded on technicalities of definitions, but is based on findings of factual guilt." (*People v. Fowler* (1999) 72 Cal.App.4th 581, 584.) "The state has a compelling interest in controlling crime and preventing and punishing recidivism." (*People v. Castello* (1998) 65 Cal.App.4th 1242, 1250.) Recidivist sentencing statutes are utilized to protect the public "when a defendant's criminal conduct has been proven to be immune from ordinary modes of punishment." (*Id.* at pp. 1250-1251.)

Here, we deal with the defendant's second conviction for failure to register. Thus, he is not only a general, criminal recidivist, he is a recidivist of criminal failure to register. The Penal Code section 290 registration requirement is intended to promote the state interest in controlling crime and preventing recidivism in sex offenders. (*Wright v. Superior Court* (1997) 15 Cal.4th 521, 527.) Because sex offenders pose a

"continuing threat to society" they must be "readily available for police surveillance at all times." (*Ibid.*) Consequently, violation of Penal Code section 290 is not merely a technical violation, it is a serious omission. This is particularly so for repeat convictions for violating Penal Code section 290.

And, while the defendant's molestations may have occurred some time ago, they involved use of force with a girl aged 11; there were three such instances of molestation; and defendant did not remain crime free thereafter, but was convicted of four counts of driving under the influence, one of which involved injury to another person, and another failure to register under Penal Code section 290. Additionally, prior to his strikes, defendant had two other driving under the influence convictions, an unspecified misdemeanor, and a battery. Defendant is an obvious danger to society because he is a sex offender, he continues to drive under the influence, to the point of hurting and endangering others, and he repeatedly refuses to comply with his legal duty to register. Consequently, there was no abuse of discretion in the trial court's denial of defendant's request to strike two of his prior strikes.

II

Defendant contends a term of 25 years to life constitutes cruel and unusual punishment in that it is disproportional to the offense. Defendant's failure to raise this fact specific issue in the trial court waives the issue for appeal. (*People v. DeJesus* (1995) 38 Cal.App.4th 1, 27.)

III

Defendant attempts to avoid waiver of his cruel and unusual punishment argument advanced in the foregoing section by urging incompetence of counsel for having failed to raise the issue.² (Reply Br. 7) This strategy is likewise unavailing.

In order to establish ineffective assistance of counsel a defendant must show that he was prejudiced by counsel's conduct or lack thereof. (*In re Alvernaz* (1992) 2 Cal.4th 924, 945 [a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies].)

To demonstrate that defendant's 25-years-to-life sentence was cruel and unusual under the California Constitution, counsel would have to show that defendant's sentence "is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424.) To demonstrate that this sentence violates the federal Constitution's prohibition against cruel and unusual sentences, counsel was required to establish that defendant's term is "grossly disproportionate" to his offense. (*People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1135.)

² By order filed May 30, 2002, we granted defendant's motion for permission to raise this argument made for the first time in his reply brief.

Commencing in 1977, defendant has accumulated six driving under the influence convictions, one of which caused injury; he has convictions, occurring on separate occasions, for battery and another unspecified misdemeanor; he has convictions for three counts of *forcible* lewd and lascivious conduct with an 11-year-old girl; he has one prior conviction for failing to register as sex offender, and, of course, there is his present conviction for that same offense. Numerous times defendant has been placed on probation, sent to jail and fined; on two separate occasions he was sent to state prison; and he has been returned to prison for parole violation. Notwithstanding his various punishments, other than when defendant is incarcerated, he has engaged in the commission of a virtually uninterrupted series of criminal offenses, most of which pose serious danger to others.

Since there is nothing disproportionate or shocking to the conscience about removing a defendant with this record from society for the lengthy term imposed, counsel cannot be faulted for not having argued that defendant's sentence was cruel and/or unusual. There was no ineffective assistance of counsel in this regard.

IV

Defendant contends that the Three Strikes law violates due process because it is facially vague. The law is facially vague, he continues, because it fails to give "specific notice of the manner in which committing a new felony offense of any kind will be punished two or three times more harshly." This

argument, as defendant concedes, has been rejected by other courts of appeal. Defendant is correct. (See *People v. Askey* (1996) 49 Cal.App.4th 381, 386-387; *People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1630; *People v. Cargill* (1995) 38 Cal.App.4th 1551, 1555.) Offering no reasons to depart from these decisions, we reject defendant's position.

DISPOSITION

The judgment is affirmed.

_____, NICHOLSON, Acting P.J.

We concur:

_____, RAYE, J.

_____, HULL, J.